HUMAN RIGHTS CODE, 1981

S.O. 1981, C. 53

IN THE MATTER OF the Complaint, as amended, made by Barbara Joyce Hajla, of Welland, Ontario, alleging discrimination with respect to services, goods or facilities because of handicap by Mike Nestoras, carrying on business as Welland Plaza Restaurant in Welland, Ontario, in contravention of sections 1 and 8 of the Ontario Human Rights Code, S.O. 1981, c.53.

BEFORE: Peter A. Cumming, Q.C., Board of Inquiry

APPEARANCES: Mr. Stephen Mason, counsel for the Ontario Human Rights Commission and the Complainant.

Mr. L. Ross Allen, counsel for the Respondent.

DECISION

1. Introduction

I was appointed as a Board of Inquiry by the Minister of Labour, the Hon. William M. Wrye, January 6, 1987, (Exhibit #1) and the hearing took place January 29, 1987.

The Complainant, Mrs. Barbara Joyce Hajla, age 45, resides in Welland, Ontario. She suffers from epilepsy and as well, arthritis of a form that makes it very difficult to walk easily and to speak clearly. She generally uses a cane or a "walker" to assist her in getting about. Although no evidence was given by physicians, one can have no doubt that the Complainant has handicaps within the meaning of paragraph 9(b) of the Human Rights Code, 1981, S.O. 1981, c.53 (hereafter, "the Code").

Mrs. Hajla described her epilepsy as being of the "petit mal" form, resulting in a seizure (notwithstanding medication) about once a week with a loss of conciousness for about five minutes. The Complainant is married to Arpad Hajla, who also testified.

The Respondant Mike Nestoras carries on business as "Welland Plaza Restaurant" in Welland, the restaurant being located in a shopping plaza not far from the apartment of Mr. and Mrs. Hajla.

Accordingly, it was the habit of the Hajlas to eat in Mr. Nestoras' restaurant four or five times a week until April 4, 1984. As Mr. Nestoras had operated the restaurant from June, 1983, it is apparent that the Hajlas had been customers of the restaurant on many, many occasions before April 4, 1984.

On April 4, 1984, upon entering the restaurant with her husband, while removing her coat, Mrs. Hajla had an epileptic seizure, fell to the floor and was unconscious for a few minutes. When she had recovered and was sitting in the booth, Mr. Arpad was told by Mr. Nestoras that he would serve them by way of "take-out" on that and subsequent occasions, but that he did not want to service Mrs. Hajla in the restaurant thereafter.

The Complainant alleges a breach of sections 1 and 8 of the Code, claiming that Mr. Nestoras infringed her "right to equal treatment with respect to services, goods and facilities, without discrimination because of.....handicap" (section 1). She filed a Complaint (Exhibit #2) which was subsequently amended (Exhibit #3).

2. The Evidence

The Complainant and her husband had been customers of Mr. Nestoras many times before the unfortunate incident of April 4, 1984. It is clear from the evidence of the complainant and her husband, and the witnesses on behalf of Mr. Nestoras, that prior to April 4, 1984, Mr. Nestoras and the waitresses had always

treated the Hajlas with the same courtesy, friendliness and consideration extended generally to customers. Indeed, it is apparent from all the evidence that the restaurant was very popular and successful, with many 'steady' customers.

It is clear from all the evidence that the Hajlas were not typical or usual customers, in terms of their behaviour, in restaurants. Ms. Georgina Joly, a former friend of the Hajlas, testified that she had eaten with the Hajlas on several occasions, but Mrs. Hajla would often argue loudly and wave her cane, to the point that Ms. Joly would leave. Ms. Joly said that Mrs. Hajla can become violent if she does not get her own way.

Ms. Beverly Ann Matthews (a waitress at Mr. Nestoras's restaurant for three and one-half years) testified that the Hajlas argued loudly with each other, virtually every time they were in the restaurant and Mrs. Hajla would sometimes cry. Ms. Matthews testified as well that the Hajlas would often have a strong body odour. Ms. Matthews testified also that the Hajlas had difficulty in making up their minds when ordering, would change their minds often and re-order, and would complain about the presentation of the food.

James Jarvis, superintendant of the apartment building in which the Hajlas live, is also a frequent customer of Mr. Nestoras' restaurant. He testified that he has heard the Hajlas argue loudly in the restaurant, and that the Hajlas have a body odour problem. He testified that he has had the health

department come to the apartment building in an unsuccessful attempt to get them to clean up their apartment.

Harry Jerome, age 74, eats in Mr. Nestoras' restaurant four to five times a week and has known Mr. Hajlas for 30 years. He also testified that the Hajlas would argue loudly, there was a noticeable body odour about them, and they would give the waitresses a hard time in ordering.

Michael Nestoras, the Respondent, age 29, came to Canada from Greece at age 17 and is now a Canadian citizen. He took over the restaurant in June, 1983, and is obviously hard-working and successful. The witnesses all frequent the restaurant regularly and like him.

Mr. Nestoras said that he received many complaints from his wife and the waitresses, about the offensive body odour of the Hajlas, and their treatment of the waitresses, while in the restaurant.

I accept the evidence of Ms. Joly, Ms. Matthews, Mr. Jenkins, Mr. Jerome and Mr. Nestoras, as to the general behaviour of the Hajlas in the restaurant. It is clear their behaviour was often inappropriate and that this disturbed the other customers, and that this inappropriate behaviour was <u>one</u> factor which caused Mr. Nestoras to ask Mrs. Hajla not to come into the restaurant again after the incident of April 4, 1984.

On April 3, 1984, Mrs. Hajlas fell on the sidewalk in front of Mr. Nestoras' restaurant. Her forehead was cut and bleeding. Mr. Nestoras, seeing what had happened, went out of the

restaurant and he or his wife obtained and applied a cold cloth to Mrs. Hajlas' forehead. Concerned about the injury, Mr. Nestoras telephoned for an ambulance and waited until it came. In the meanwhile, he had offered to the Hajlas that Mrs. Hajlas come into the restaurant and rest.

The next day, April 4, the Hajlas came into the restaurant at noon. Mr. Nestoras, who acts as the chef for his restaurant, was in the kitchen at the time. He testified that a waitress came into the kitchen and told him someone had fallen on the floor. Mr. Nestoras left the kitchen and spoke to Mr. Hajla, suggesting that an ambulance be called, but Mr. Hajla said an ambulance was not necessary. However, Mr. Nestoras went back into the kitchen and decided on his own initiative to call an ambulance because he thought Mrs. Hajla might be hurt.

The ambulance arrived and the ambulance attendants helped Mrs. Hajla into a booth and left. Ms. Matthews, the waitress, testified she then gave menus to the Hajlas. The Hajlas then each placed an order for a meal.

Mr. Nestoras testified that at this point he was upset. He generally did not care for the behaviour of the Hajlas in his restaurant, and now he was faced with Mrs. Hajlas having fallen two days in a row. Mr. Nestoras testified that he did not know at that time about the epilipsy but was afraid something was happening to the health of Mrs. Hajla and he now felt that it was perhaps unsafe for Mrs. Hajla to be there. He was concerned about her getting hurt on his premises, and he did not want to

have to continue to call for an ambulance. He was afraid she might fall again. He was "fed up at that point", felt he was put "on the spot" and "did not know what to do".

Accordingly, Mr. Nestoras testified he decided he was "not going to serve them anymore" and advised the waitress, Ms. Matthews, that they would only receive food for "take-out". Ms. Matthews testified that when she went back to the booth from the kitchen and told Mr. Hajla that they would be able to have only "take-out" and that Mr. Hajla agreed. Ms. Matthews brought the food out from the kitchen and Mr. Hajla came to the cash register, and paid for the food, and the Hajlas left.

Mrs. Hajla states in her Complaints (Exhibits #2 and #3) that "there were others in the restaurant at the time and I felt very embarassed at being asked to leave". I do not accept this claim. In her testimony she said "a lot of people [in the restaurant at the time] knew me". No witnesses were produced. The Hajlas themselves both testified that no reason was given to them as to why they were asked to leave, although the Complaints assert otherwise. All of the evidence suggests that Mr. Nestoras and the waitresses were polite and considerate of Mrs. Hajla at all times. Ms. Matthews undoubtedly quietly advised Mr. Hajla of Mr. Nestoras' decision that the Hajlas were to receive only "take-out" and they left without a fuss. Any customers noting the departure of the Hajlas would have surmised simply that it was because she was not feeling well. A few minutes before, she had been lying on the floor unconscious. There was no evidence

to suggest anyone would suspect Mr. Nestoras refused to serve her.

After leaving the restaurant April 4, 1984, Mr. Hajla may have returned subsequently on one or two occasions for take-out orders, but the Hajlas never once asked Mr. Nestoras if they could return to the restaurant. Moreover, the Complaint (Exhibit #2) was signed June 30, 1984, and when Mr. Fred Reuter, the investigating officer of the Human Right Commission first telephoned Mr. Nestoras for his version of the facts on August 31, 1984 (as Mr. Reuter testified) Mr. Nestoras said that Mr. and Mrs. Hajla could return to the restaurant. This position has been mainained by Mr. Nestoras to the present time, but the Hajlas have never returned to the restaurant.

Considering all of the evidence, I have no doubt in concluding that the real reason for the Complaint and this proceeding is that Mr. and Mrs. Hajla saw the situation as an opportunity to get some money from Mr. Nestoras through the claimed breach of the Code.

There was considerable testimony from Mrs. Joly, Mr. Jarvis and Mr. Jerome about the general lack of ethics of Mr. and Mrs. Hajla. Mr. Jarvis, the superintendant, testified that the Hajlas had their own car and often used it, but would abuse the publicly financed transportation for handicapped people by calling upon the service. Mr. Jerome stated that Mr. Hajla would cash his pay cheques at his service station, but had on occasion attempted to get Mr. Jerome to cash the "cheque stub" after

previously having cashed the cheque. Ms. Joly testified that notwithstanding the considerable help she had given to Mrs. Hajla in the past, Ms. Hajla had sued Ms. Joly for $600.00 on a fictitious claim. These allegations were relevant to the character and credibility of the Hajlas, but while they give support to my findings, the basis for my conclusion as to the underlying reason for the Complaint is founded in the evidence of Mr. and Mrs. Hajla and Ms. Matthews and Mr. Nestoras. It is quite clear from all the evidence that Mr. Nestoras generally treated his customers, including disabled people and including the Hajlas, with courtesy and consideration. Indeed, Mr. and Mrs. Hajla stated expressly in their own evidence that Mr. Nestoras and the waitresses had always been "nice". In the language of the Code, he generally provided "equal treatment.....without discrimination".

Mr. Nestoras testified that he did not know until after April 4, 1984 about Mrs. Hajla being epileptic and I accept his evidence. However, it is clear that his decision on April 4, 1984, to ask the Hajlas not to return to the restaurant except for take-out, was due in part to the fact that Mrs. Hajla had some disability which made her prone to falling, and that Mr. Nestoras was worried about this disability having an adverse influence upon his customers in patronizing the restaurant. That is, one operative reason for the denial of access to the restaurant to Mrs. Hajla was because of the perceived impact of

her handicap upon the operation of his restaurant and, in particular, the disturbance to customers.

3. The Law

To sustain a complaint of discrimination in the instant type of situation, a complainant needs to establish:

(1) the complainant was denied equal treatment with respect to services, goods or facilities; and

(2) one of the operative reasons for the denial of equal treatment is a reason prohibited by the Code, specifically, the denial of equal treatment because of a handicap (see Arny Iancu v. Simcoe County Board of Education (1983) 4 C.H.R.R. D/1203 at D/1204 to D/1207 (Ont. Bd. of Inquiry) for a discussion of the situation when "mixed motives" are present).

There can be no doubt that in denying the Complainant continued access to his restaurant as of April 4, 1984, the Respondent was denying her equal treatment with respect to his restaurant's services and the use of the facility.

As for the reasons for the denial of equal treatment, a number of factors are established by the evidence and it was the cumulative total that caused the Respondent to make his decision to discriminate. The lack of personal hygiene of the complainant and her husband, their tendency to disturb other customers by loud arguing, and their lack of consideration for the waitresses

were all background factors weighing against the Respondent wanting the Complainant and her husband as customers. However, all of those factors were a mere nuisance and the Respondent clearly would not have denied continued access to his restaurant as of April 4, 1984, but for the two falling incidents involving the Complainant on April 3 and 4. These incidents led to mixed reasons in the Respondent's decision to deny access to the Complainant as of April 4. The respondent was concerned about his potential liability for an injury; he was genuinely concerned for the safety of the complainant herself. Responent's counsel did not refer to a possible paragraph 16(1)(b) defence, but in my view it does not apply in the instant situation. To constitute a defence thereunder, in my opinion, a Respondent would have to be able to show "in an objective sense" that there was some basis for a safety concern if the Complainant was to be allowed into his restaurant. An objective basis was not established. It is not enough for the Respondent to have a subjective concern. See Ontario Human Rights Commission et al v. The Borough of Etobicoke (1982), 3 C.H.R.R. D/781 (SCC).

In any event, in the instant situation, it was not "for the reason only..." (paragraph 16(1)(a) of the Code) of a safety concern that the Respondent discriminated. One operative reason for his discrimination was that because of the Complainant's handicap the Respondent perceived that his customers would be less likely to patronize his restaurant if the Complainant was to continue to be a customer.

One operative reason for Mr. Nestoras' decision to discriminate at that point was the mere fact that he perceived her to have a "...physical disability [or] infirmity" (paragraph 9(b) of the Code).

This is sufficient to constitute a breach of the Code: see Arny Iancu, supra. It does not matter that Mr. Nestoras did not know she had epilepsy at that time. It is enough that he perceived a "handicap" on her part and that this was one operative reason for discrimination. It is to be noted the language of paragraph 9(b) of the Code defines "because of handicap" as including "the reason that the person.....is believed to have.....any degree of physical disability [or] infirmity (emphasis added)". In fact the Complainant does indeed have handicaps, and if the epilepsy is not apparent, her severe arthritic condition results in obvious symptoms of a handicap in terms of her movement and speech.

The motivation underlying the Respondent's discrimination because of handicap was that he feared he would lose some of his customers if the Complainant continued to frequent the restaurant. The Respondent had a clear intention to discriminate; just as clearly, he did not have any evil or malicious motive underlying his intent to discriminate. He was worried about the impact upon his other customers through the Complainant being in his restaurant. However, it is well established that it cannot be a defence of a Respondent to assert that he only discriminated because of the perceived or real

preferences of customers. There are many decisions which have held that it is not a defence to say that one discriminated as a matter of business or economic advantage or necessity, to meet the wishes of other persons, such as customers, tenants or employees. See, for example, P.G. du Quebec v. Service de Taxis Nord Est (1979) Inc., (1986) 7 C.H.R.R. D/3112; Iberto Imberto v. Vic and Tony Coiffure and Vince and Tony Rusica (1982) 2 C.H.R.R. D/392 at D/397 (John D. McCamus; Ont. Bd. of Inquiry); and G.L. Scott v. Foster Wheeler Limited (1985) 6 C.H.R.R. (Ian Hunter; Ont. Bd. of Inquiry).

More generally put, one cannot break the law because another person wants or encourages the transgressor to do so. Any other approach of the law would tend to defeat the public policy objectives in human rights legislation. It would be absurd for the law to allow a defence for factors which go directly contrary to the public policy that the law is seeking to put into effect. The Preamble to the Code refers to the underlying public policy as being in part:

> "...to recognize the dignity and worth of every person and to provide for equal rights and opportunities without discrimination that is contrary to law, and having as its aim the creation of a climate of understanding and mutual respect for the dignity and worth of each person so that each person feels a part of the community and able to contribute fully to the

development and well-being of the community and the Province..."

American courts take the same position in respect of Title VII of the Civil Rights Act, (42 U.S.C. s.2000e et seq.P.L. 88-352). Even the biases of customers in a foreign jurisdiction cannot excuse an American employer from compliance with the Civil Rights Act: see Fernandez v. Wynn Oil Co. 633 F.2d1273 (9th Cir. 1981) and "The Biases of Customers in a Host Country as a Bona Fide Occupational Qualification: Fernandez v. Wynn Oil Co." (1984) 57 Southern California Law Review 335. See generally, "Developments in the Law - Employment Discrimination and Title VII of the Civil Rights Act of 1964" (1971) 84 Harvard Law Review 1109, at 1176-1186.

For the reasons given, I find on the evidence that the Complaint is substantiated, in that the Respondent on April 4, 1984 was in breach of sections 1 and 8 of the Code, denying the Complainant "equal treatment with respect to services...and facilities, without discrimination because of ... handicap" .

When it comes to an appropriate remedy, the instant situation leaves me with some concern.

My firm impression, given the evidence of the Complainant and her husband, coupled with that of the Respondent, was that they were interested only in receiving money through pursuing this Complaint. Up to and including April 4, 1984, the Respondent and his staff had shown the Complainant and her husband every courtesy. The Complainant and her husband and the

Respondent all knew each other fairly well and saw each other frequently in the setting of the restaurant. Mr. Nestoras and his staff had endured some frustration in having the Hajlas as customers, due to the minor discourtesies shown by the Hajlas to the waitresses and by the Hajlas lack of personal hygiene. The Respondent did all he could to assist the fallen Complainant on April 3 and April 4. He was in breach of the Code by refusing the Complainant further service as of the April 4, 1984, incident but the Complainant was not publicly embarrassed or humiliated, as she claims. Nor do I think she was inwardly hurt and humiliated. The Respondent had always been nice to her. If she or her husband had approached the Respondent after the April 4, 1984, incident, and explained clearly the situation as to her having epilepsy, I have no doubt the Respondent would have allowed her to return to the restaurant. There was no evidence that the Complainant or her husband ever asked the Respondent if they could again frequent the restaurant or that they told him they were intending to file a Complaint with the Ontario Human Rights Commission in advance of doing so. When the Respondent was contacted by the Commission August 31, 1984, he immediately responded that the Complainant and her husband were free to return to the restaurant at any time, but they have not done so.

I think this case is distinguishable from the only human rights' decision I have found involving a like situation of a complainant denied service in a restaurant because of a handicap, being John Kellerman v. Al's Restaurant and Tavern Limited

(decision June 3, 1986, not yet reported: M.L. Friedland, Ont. Bd. Of Inquiry).

Subsection 40(1) of the Code provides :

> "Where the board of inquiry, after a hearing, finds that a right of the complainant under Part I has been infringed and that the infringement is a contravention of section 8 by a party to the proceeding, the board may, by order,
>
> a) direct the party to do anything that, in the opinion of the board, the party ought to do to achieve compliance with this Act, both in respect of the complaint and in respect of future practices; and
>
> b) direct the party to make restitution, including monetary compensation, for loss arising out of the infringement, and, where the infringement has been engaged in wilfully or recklessly, monetary compensation may include an award, not exceeding $10,000, for mental anguish."

I have reviewed at length the general question of damages in terms of remedies, in earlier decisions: see in particular Rosanna Torres v. Royalty Kitchenware Limited and Francesco Guercio (1982) 3 C.H.R.R. D/858 at D/863 to D/873; Morley Rand and Canadian Union of Industrial Employees v. Sealy Eastern Limited, Upholstry Divison (1982) 3 C.H.R.R. D/938 at D/954 to D/1958 and Cindy Cameron v. Nel-Gor Castle Nursing Home and Merlease Nelson (1984) 5 C.H.R.R. D/2170 at D/2196 to D/2198. Clearly, compensation damages should be awarded generally, when a complaint has been found to be justified, and particularly so when an actual loss has been sustained, Torres, supra at D/869.

In the instant situation, there has not been any actual loss sustained to the Complainant's dignity or self-respect that calls for compensation. Nor has there been emotional upset,

psychological damage or mental anguish, caused by the denial of her human right.

However, the Code allows as well, in my opinion, for the award of general damages for simply the loss of the right to freedom from discrimination (Cameron, supra at paras. 18537 and 18539,, D/2198; Rand, supra at D/956). I stress that, in my view, generally a separate component of the general damage award should reflect the loss of the human right to equal treatment. This is based upon the recognition that, independent of the actual monetary or personal losses suffered by the complainant whose human rights are infringed, the very human right which has been contravened itself has intrinsic value. I believe that this element of a damage award is an important component of any award, and this is often overlooked.

Having emphasized my views as to the remedies available at law in human rights cases, I now stress as well that there is an overriding discretion for the tribunal to deny damages, considering all the circumstances. This can be done in exceptional circumstances. Paragraph 40(1)(b) of the Code says that:

> "the board, may, by order, direct the party to make restitution, including monetary compensation, for loss arising out of the infringement, and, where the infringement has been engaged in wilfully or recklessly, monetary compensation may include an award, not exceeding $10,000, for mental anguish" (emphasis added)

It is to be noted that this is not a case where subsection

40(6) of the Code applies, because the Complaint is not being dismissed. That provision reads:

> "Where, upon dismissing a complaint, the board of inquiry finds that,
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> a) the complaint was trivial, frivolous, vexatious or made in bad faith; or
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> b) in the particular circumstances undue hardship was caused to the person complained against,
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> the board of inquiry may order the Commission to pay to the person complained against such costs as are fixed by the board."

While I think the pursuit of the Complaint in the instant situation, given the totality of the circumstances, was inappropriate, the Complaint cannot be dismissed. There has been a breach of the Code. Moreover, while I have no doubt that the Respondent would not deny to the Complainant access to his restaurant in the future, and in any event he has apparently agreed recently to sell it, in my view a compliance order should be given (although not requested) pursuant to paragraph 40(1)(a), given the breach of the Code, as a matter of course.

My point however, is that the machinery of the state should not be brought into play in a situation like the present one, where there has not been any real loss, nor any continuing denial of right, and where the law (although there has been a breach thereof) is being used solely as a means to demand money from a Respondent. I emphasize that I do not mean to imply any criticism at all of the Ontario Human Rights Commission. It is with the benefit of the evidence at the hearing, some of which

was not available to the Commission in advance of the hearing, that I am able to reach my conclusions.

In my view, and I so find on the evidence, this Complaint was not filed and pursued because there was a breach of the Code. Rather, because there was an apparent breach of the Code, the Complainant's sole motive was to receive financial gain, not financial compensation. The significant words in paragraph 40(1)(b) are "...including monetary compensation...(emphasis added)". The Complainant was not seeking "compensation" for the denial of her rights, rather she was seeking gain because she realized the Respondent may have been in breach of the Code, which in the totality of the circumstances was not of real concern other than as a means for her to thereby gain. In doing so, she put the Ministry of Labour (and taxpayers) and the Respondent, to some considerable expense. For these reasons, exercising my discretion, I do not believe any award of damages should be given in this situation.

Order

This Board of Inquiry having found the Respondent, Mike Nestoras, carrrying on business as Welland Plaza Restaurant to be in breach of sections 1 and 8 of the Ontario Human Rights Code, 1981, c.53, proclaimed in force June 15, 1982, in respect of the Complainant, Mrs. Barbara Joyce Hajla, for the reasons given, this Board of Inquiry orders the following:

1. The Respondent, Mike Nestoras, carrying on business as Welland Plaza Restaurant or otherwise, in the future, shall offer equal access and treatment to the Complainant and all other persons with respect to the services and facilities of his restaurant business, without discrimination because of handicap, and more generally, in full compliance with the provisions of the Ontario Human Rights Code, 1981, S.O. 1981, c.53, as amended.

Dated at Toronto this 4th day of February, 1987.

Peter A. Cumming, Q.C.
Board of Inquiry